IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.7649 OF 2006

Anil Janardan Kale and others ...Petitioners

vs.

Tara Prabhakar Kale and others ...Respondents

Mr.Y.J.Master for the Petitioners
Mr.A.J.Joshi for Respondent Nos.1 to 10.

CORAM: A.S.OKA,J.
DATE : APRIL 30,2007.

P.C.:

1. Heard learned counsel for the parties. By consent taken up for hearing forthwith. The Petitioners have taken exception to the order dated 17th November 2006 passed by the learned Civil Judge (Junior Division),Dahanu below application at Exh.60 passed in Regular Darkhast No.8 of 2003. The Judgment and Decree dated 23rd June 1995 passed in Regular Civil Suit No.98 of 1990 was put to execution by the legal representative of the original Plaintiff. The learned Trial Judge passed an order appointing a Commissioner for execution of the decree for partition.

2. An objection was raised by the Petitioner by filing an application at Exh.60 which has been rejected by the learned Trial Judge by passing the impugned order. It was submitted by the learned Advocate for the Petitioner that where the decree is for partition of an undivided estate assessed to the payment of revenue to the Government, the partition has to be

effected by the Collector in view of section 54 of the Code of Civil Procedure,1908. His submission is that on plain reading of the plaint, the land which is subject matter of the suit is subject to payment of revenue assessment. The learned Counsel for the contesting Respondent states that there is no decree passed in respect of the land which is subject matter of the assessment to payment of land revenue and the decree passed is confined to the house property. He, therefore, submitted that no interference is called for.

3. Issue raised before the learned Trial Judge was whether in view of section 54 of the said Code, execution application could have been entertained and a Court Commissioner could have been appointed to execute the decree of partition. Perusal of the impugned order shows that the learned Judge has simply stated that the executing court cannot go behind the decree. The learned Judge has not considered the question as to whether decree for partition is in respect of the land which is assessed to payment of land revenue to the Government. After considering the said question, the learned Judge ought to have considered the question whether the objection based on section 54 of the said Code was tenable and whether the said objection could have been raised in execution application. In execution application, a contention can always be raised that the decree is not executable. However, all these aspects have been completely overlooked by the trial

Court. Only on this ground the impugned order deserves to be quashed and set aside.

4. Hence, I pass the following order :

i) Impugned order dated 17th November 2006 passed on application at Exh.60 is set aside and the application at Exh.60 is restored. The executing court will decide the said application at Exh.60 afresh as expeditiously as possible and preferably on or before 31st July 2007.

ii) All contentions of the parties are expressly kept open.

iii) The Writ Petition is accordingly disposed of.

JUDGE